No. 14329

United States Court of Appeals

For the Ninth Circuit

RAYONIER INCORPORATED, a corporation, *Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLANT

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(**Note:** For convenience, appellant sometimes is referred to herein as Rayonier and appellee sometimes is referred to as the Government or the United States or the Forest Service. For brevity, the amended complaint sometimes is referred to as the complaint.

(Many Federal and Washington State statutes referred to in this brief are, for convenience, set forth in full in the appendix hereto.)

JURISDICTION

Jurisdiction of the District Court for this action is claimed and acquired under Title 28, U.S.C. §§ 1346(b) and 2671 through 2680, inclusive, commonly known as the Federal Tort Claims Act, the United States of America being defendant, and is also claimed and acquired because the acts and omissions complained of by Rayonier and the damage to Rayonier's property de-

scribed in the complaint occurred within the Western District of Washington, Northern Division (R. 3).

Jurisdiction of this Court is claimed and acquired under Title 28, U.S.C. §§ 1291 and 1294(1). The Government moved to "dismiss the action because the amended complaint fails to state a claim against the Government upon which relief can be granted" (R. 49). The District Court granted the motion to dismiss and, Rayonier having elected to stand on its amended complaint, dismissed said amended complaint with prejudice (R. 66-67). The order of dismissal, therefore, was a final order and appealable to this Court. Notice of appeal was duly given and filed (R. 67) and the record in the District Court was duly filed in this Court (R. 71).

There are no treaties of the United States or statutes the validity of which is involved.

STATEMENT OF THE CASE

The complaint has been carefully drawn and worded and we urge full reading thereof (R. 3-33).

This is a suit for damages caused by a forest fire which burned on September 20, 1951, and for several days thereafter. After the fire broke out on September 20th, there was little that anyone could do to stop it. The torts on which liability is claimed occurred prior to that date, but were the direct and proximate cause of the fire damage.

Boiled down, the Government's liability is that of a landowner who knowingly permitted nuisance and fire hazardous conditions and practices on its land, contrary to law and statute, and whose employees, with full

knowledge of the dangerous conditions and risks involved and having full means at their disposal to eliminate or greatly minimize the risks, nevertheless negligently and without due care, failed to take action to prevent a fire which started on its property on August 6th, failed to contain and control it in its preliminary stages, and failed to pursue and extinguish the resultant smoldering fires which burned for forty days and which, on September 20th, spread and broke into a catastrophic blaze.

The amended complaint alleges, among other things, the following:

The United States owns and operates extensive stands of timber and lands under the administration of the Forest Service of the Department of Agriculture, the same being held and operated for pecuniary gain and profit, that is, in a "proprietary" rather than "governmental" capacity. The Government is a timber and landowner and operator just as are Rayonier and other private parties in the area involved in this suit (R. 5-6).

On and for many years prior to August 6, 1951, the Government owned lands across which was a railroad right of way of the Port Angeles Western Railroad, but the right of way, as well as the adjacent lands, were subject to control and access by the Government. On the right of way and adjacent lands of the Government were accumulations of logging and clearing debris, rotten ties, dry grasses, brush and trees which constituted a nuisance under the statutes of Washington and were a fire hazard, all of which the Forest Service employees knew. The railroad company operated defective and

deficient equipment over the right of way and failed to have its passing trains followed by a speeder or other equipment to watch for fires that might be caused by the train, contrary to the requirements of Washington statutes, all of which was known to the Forest Service employees (R. 11-13).

About noon, August 6, 1951, approximately six spot fires caused by a passing train started on and in the vicinity of the right of way on Government lands. Five of them were soon extinguished and the sixth could have been but wasn't. The fire continued to spread and by nightfall covered about sixty acres, where it was confined and controlled. It could have been extinguished but wasn't. About 2:30 p.m. on August 7th, the fire broke away and spread over a 1600-acre area of logged-off lands. The fire in the 1600-acre area was contained and controlled by August 11th (R. 12-15). It remained in smoldering form until the early hours of September 20th, when sparks from it blew into the nearby slash and timber and a tremendous forest fire resulted which burned an area ranging up to five miles in a north-south direction and twenty miles in an east-west direction (R. 15, 18-25). That fire caused the damage complained of (R. 29).

Fire fighting activities were under the exclusive supervision and control of the District Ranger and his subordinates in the Forest Service (R. 13-14). Fifteen negligent acts and omissions proximately causing the damage are alleged (R. 26-29). Without hereby waiving any of the claims of negligence or intending to limit them, the negligence may generally be classified as fol-

lows: Permitting the long continued existence of fire hazardous conditions on the Government's lands, contrary to the statutes of the State of Washington (R. 11-12, 7-8); permitting the operation of defective and deficient equipment on those lands by the Port Angeles Western Railroad, and permitting improper practices by the railroad, all of which constituted fire hazards and were contrary to statute (R. 11-13, 7-8); failing to control and completely extinguish the fire in each of its three early stages, that is, at the spot fire stage, the 60-acre stage, and the 1600-acre stage (R. 15, 17-26); failing to use sufficient men and equipment and adequate methods to control, hunt out and extinguish all fire, although sufficient men, equipment and water were at all times available and there was ample time in which to perform the work (R. 18); and lastly, in continuing negligent and inadequate practices in the face of weather conditions, weather forecasts, fuel conditions, topography, and the tremendous value of property which was in jeopardy because of the smoldering fire (R. 10, 20-21, 23).

The Government's land and timber need looking after just as do the land and timber owned by private parties. Like private property owners, the Government employs caretakers whose duties are many and varied. As caretakers, the District Ranger and his crew had the duty to see that the Government's lands were maintained and kept in the manner required of all such landowners by the law and the statutes of the State of Washington; to patrol and inspect all lands in the area; to discover, eliminate and abate conditions thereon which constituted fire hazards; to watch for the outbreak of fire, and

when fire occurred within the area, to fight and use every reasonable effort to control and extinguish the same; and to supervise, direct and control activities in fighting and suppressing such fires. They had the authority and power to hire men and equipment to fight fires, and to summon and impress help to prevent, suppress and control fires (R. 8-10, 16-18).

A large area of lands, including those mentioned in the complaint, had, by contract between the Forest Service and the State of Washington, been established as a Forest Service Protective Area. By said contract the Forest Service agreed to protect said area against fire and to take immediate, vigorous action to control all fires originating on or threatening such lands. The contract also provided, among other things, as follows (R. 6-7):

> "9. Nothing herein contained shall be understood to impair the right of the United States, the State of Washington, or any person or corporation to recover the costs of suppression and damages on account of fires resulting from the negligent, wilful, or unlawful act of any forest landowner or timber operator within said protective units or any other person or corporation, or to impair any other rights of similar nature under the Washington Forestry Laws, under the Federal laws, or under general law."

Protection and preservation of the forests is a matter of first concern, both to the residents of the area and to the timber and mill operators. As a consequence, men willingly and voluntarily respond to calls for assistance in fighting fires, and owners of equipment willingly and voluntarily furnish their equipment. A

Fire Suppression Plan for the Forest Service Protective Area had previously been adopted and approved by the Supervisor of the Olympic National Forest, and was to be followed and employed by the District Ranger and his subordinates. That Plan was in effect at all times involved. The Plan included, among other things, a list of privately employed men who and privately owned equipment which were available to fight and suppress any fire within the Area, and the method of getting such men and equipment to the scene of the fire. Additional men and equipment were also available. The Plan contemplated that the District Ranger and his subordinates would call upon and use all men and equipment necessary to suppress and extinguish fires, and it was one of the District Ranger's duties to do so. The Forest Service did not own, maintain or operate a fire department or fire fighting organization as such, but, just as other owners of timber and timberlands in the area, it had some men and equipment available to fight fires, and knew where additional men and equipment could readily and quickly be obtained (R. 16-18).

There are two rivers in and adjacent to the 1600-acre area which could provide more than enough water to supply all conceivable requirements in fighting the fire. There were useable and safe roads both within the 1600-acre area and the lands adjacent thereto providing access to all parts of it. The nearby railroad could also be utilized (R. 19-20).

Fires smolder and burn in debris, logs and stumps for long periods with no visible flame. That was the con-

dition which continued in the 1600-acre area from August 11th to September 20th, when the fire broke away (R. 21-22). The Forest Service employees knew this. They could have combed the area, and especially the key points, with men and equipment to search out and extinguish all such smoldering fire (R. 6-9, 21-23). Notwithstanding this, notwithstanding the extremely dry and hazardous conditions which had prevailed for four months prior to August and during all times mentioned in the complaint, and notwithstanding the extensive stands of timber which were imperiled, the Forest Service did practically nothing for the forty days from August 11th to September 20th (R. 10, 4-5, 21).

Northeasterly winds are not uncommon in the area. They are dry winds, decreasing the humidity and increasing the fire hazard. Such winds, sweeping over the 1600-acre area, would naturally carry sparks westerly and southerly into the big timber. On September 13th, such a wind blew sparks out of smoldering debris near the westerly boundary of the 1600-acre area, causing a fire close by. That incident was observed and occurred when men were present, and as a consequence the fire was extinguished (R. 20-23).

With full knowledge of all of the foregoing, the District Ranger, Sanford Floe, and his assistants, employed only a few men and a few items of equipment and tools during the forty days, keeping the area mostly on a patrol basis during the day and maintaining no men on the job and no lookouts after the normal working day (R. 21-25).

In spite of weather forecasts of northeasterly winds

and decreasing humidity, the same indifferent practice was followed by the Forest Service employees on September 19th and 20th. The anticipated wind blew sparks from the 1600-acre into the adjoining slash and timber, and the big fire was under way (R. 20-26).

Rayonier's timber, lands, railroad, bridges, telephone system and other property were damaged or rendered useless by the fire and Rayonier incurred expenses in connection therewith, for which recovery is sought (R. 29-33).

The District Court granted appellee's motion to dismiss the amended complaint, with prejudice, on the ground that it fails to state a claim against appellee upon which relief can be granted (R. 66). This appeal is from the order granting the motion.

SPECIFICATIONS OF ERROR

The District Court erred:

1. In granting the motion to dismiss the amended complaint and in dismissing the amended complaint (R. 66-67);

2. In finding that the Forest Service employees, of whose negligent acts and omissions complaint is made, were public firemen (R. 38-39);

3. In holding that because the Forest Service employees were public firemen the case at bar is controlled by *Dalehite v. United States,* 346 U.S. 15, 97 L.Ed. 1427, 73 S.Ct. 956 (1953) (R. 37);

4. In holding that notwithstanding the Federal Tort Claims Act the doctrine of immunity from liability for

negligence of firemen which is applicable to municipalities is also applicable to the Federal Government;

5. In holding that the Federal Government is immune from liability for several negligent acts and omissions simply because its public firemen were involved in some but not all thereof, even though the negligence complained of includes:

> Negligent and unlawful conditions and practices existing and occurring on lands owned and operated by the United States for pecuniary gain and profit, and
>
> Negligent acts and omissions of federal employees in performing or failing to observe and perform duties required of a landowner by the law and statutes of the State of Washington.

SUMMARY OF ARGUMENT

1. All well pleaded allegations of the complaint are deemed admitted. The complaint must be construed in a light most favorable to plaintiff.

2. The Federal Tort Claims Act states that the United States shall be liable in tort " * * * in the same manner and to the same extent as a private individual under like circumstances * * * " (28 U.S.C. Sec. 2674) and " * * * under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." (28 U.S.C. Sec. 1346(b)). A private individual standing in the place of the United States under the circumstances alleged in the amended complaint would be liable to appellant under Washington law.

3. The essential elements of actionable negligence are the existence of a duty, a breach thereof, and resulting injury.

a. A private individual under like circumstances would owe a duty and be liable to Rayonier:

Under common law, by which, if defendant's conduct threatens harm to plaintiff which a reasonable man could foresee, the defendant owes plaintiff a duty. This duty would exist in such individual, both as a landowner and as a volunteer. This principle applies with even greater force where the acting party (such as the Forest Service employees acting in this case) has superior knowledge of the possible harm.

Under the statutes of the State of Washington. Under contract between the State of Washington and the Forest Service by which the Forest Service undertook to fight and suppress the fire. It is immaterial whether Rayonier could sue the United States under the contract. The latter's duty extends to Rayonier. A private individual could have been party to such contract instead of the United States because such arrangement is authorized by both State and Federal statutes.

b. A private individual under like circumstances would be liable to Rayonier because of failure to observe and comply with the law and statutes of the State of Washington and because of the many negligent acts and omissions alleged in the complaint.

c. Rayonier was damaged as a direct and proximate result of the breach of the several foregoing duties, and of the negligence, as alleged in the complaint.

Since a private individual could have been in like cir-

cumstances and would have been liable to Rayonier under the law of the State of Washington, it follows that the United States is liable.

4. The United States has waived immunity from tort liability in broad language, and retains immunity only in the instances excepted in 28 U.S.C. §2680. None of those exceptions is applicable to the case at bar. The only one urged by the United States as applicable is subsection 2680(a).

5. The acts and omissions complained of did not involve exercise or performance of a discretionary function within the meaning of subsection 2680(a).

6. *Dalehite v. United States, supra,* is neither applicable to nor controlling of the case at bar. The Court's language must be read in the light of the facts in that case, which facts are so different from the case at bar as to render the opinion valueless as precedent.

7. Under the Federal Tort Claims Act, there is no justification for applying to the Federal Government the doctrine of immunity of municipalities from liability for torts committed in the performance of a governmental function as distinguished from a proprietary function. The Act recognizes no such distinction except as the limited instances and functions specifically described in 28 U.S.C. §2680 might be characterized as governmental. Even if principles of municipal law are properly extended to the case at bar, the United States would still be liable because: (a) the acts and omissions complained of were pursuant to a proprietary function on lands owned and operated by the United States for pecuniary gain and profit, and (b) a municipality

would be liable for failure to use due care to prevent, fight and extinguish fire originating on its lands, whether such lands be held in a governmental or proprietary capacity and whether attended by public firemen or others.

ARGUMENT

Part I.

Construction of Complaint

All of the well pleaded allegations of fact in the amended complaint are deemed admitted by appellee's motion to dismiss.[1] On a motion to dismiss which challenges the sufficiency of an amended complaint to state a claim upon which relief can be granted,[2] the amended complaint must be construed in a light most favorable to the plaintiff, with all doubts resolved in plaintiff's favor and all allegations accepted as true.[3] Neither ap-

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[1] Rules 12(b) and 56 of the Federal Rules of Civil Procedure. *Ledbetter v. Farmers Bank & Trust Co.,* 142 F.2d 147 (4th Cir. 1944); certiorari denied 323 U.S. 719, 89 L.Ed. 578, 65 S.Ct. 48; rehearing denied 323 U.S. 813, 89 L.Ed. 647, 65 S.Ct. 112; rehearing denied 324 U.S. 886, 89 L.Ed. 1435, 65 S.Ct. 682; motion denied 325 U.S. 837, 89 L.Ed. 1963, 65 S.Ct. 1189.

[2] Rule 12(b) (6), Federal Rules of Civil Procedure.

[3] *Meredith v. John Deere Plow Co. of Moline,* 89 F. Supp. 787 (S.D. Iowa 1950); affirmed 185 F.2d 481 (8th Cir. 1950); certiorari denied 341 U.S. 936, 95 L.Ed. 1364, 71 S.Ct. 856. See also *Forstmann Woolen Co. v. Murray Sices Corporation,* 10 F.R.D. 367 at 370, where the District Court for the Southern District of New York said:

"* * * under the Federal Rules a pleading should not be dismissed unless it appears to a certainty that

pellee nor the District Judge has asserted that anything in the amended complaint is not well pleaded, and this Court may therefore accept as true every fact alleged.

Part II.

A Private Individual Under Like Circumstances, and Therefore The United States, Would Be Liable

The Federal Tort Claims Act states that the United States shall be liable in tort " * * * in the same manner and to the same extent as a private individual under like circumstances * * * " (28 U.S.C. Sec. 2674) and " * * * under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." (28 U.S.C. Sec. 1346 (b)). A private individual standing in the place of the United States under the circumstances alleged in the amended complaint would be liable to appellant under Washington law.

The essential elements of actionable negligence are the existence of a duty, a breach thereof, and resulting injury.[4]

A private individual under like circumstances would have owed a duty to Rayonier: under the common law both as a proprietor of land and timberlands and as a volunteer (R. 7-8); under the statutes of the State of Washington (R. 8); and under contract (R. 6-7). Detailed discussion of these three duties follows.

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[4] Prosser on Torts, §30, Elements of Cause of Action, especially page 177.

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the pleader is entitled to no relief under any state of facts which could be proved in support of the claim."

A. Under common law, if defendant's conduct creates or increases an unreasonable risk of harm to plaintiff which an ordinary man could foresee, the defendant owes plaintiff a duty. In the case at bar, this duty would exist both as a landowner and as a volunteer. This principle applies with even greater force where the acting parties (such as the Forest Service employees acting in this case) have superior knowledge of the possible harm.

1. ***Duty as landowner.***

After the discovery of fire on his premises a landowner must exercise reasonable care to prevent its spread to adjoining lands and he will be liable for damages caused through his failure to exercise such reasonable care. In the case of *Sandberg v. Cavanaugh Timber Co.,* 95 Wash. 556, 164 Pac. 200 (1917), the court used the following language, commencing at page 558:[5]

> "The authorities convince us that there may be negligence such as to render the owner of premises liable to his neighbor in his failure to use due diligence in preventing the spread of a fire originating upon his own land though it so originate without any act or fault of his own. The common law seems to have rendered an owner of premises on which fire starts, regardless of the manner of its starting, absolutely liable for damages which his neighbor suffers therefrom, but the harshness of this doc-

[5] To the same effect is *McCann v. Chicago, Milwaukee & Puget Sound Railway Company,* 91 Wash. 626, 158 Pac. 243 (1916), and *Jordan v. Spokane, Portland & Seattle Railway Company,* 109 Wash. 476, 186 Pac. 875 (1920). See also cases from other jurisdictions which are included in the following annotations: 42 A.L.R. 821, 111 A.L.R. 1149 and 18 A.L.R.2d 1097.

trine has been much modified in both England and this country in recent times. In the text 11 R.C.L. 940, the learned editors state the present day rule as follows:

" 'The general rule in this country, as in England, is now well settled that when a private owner of property sets out fire on his own premises for a lawful purpose or when a fire accidentally starts thereon, he is not, in the absence of a statute to the contrary, liable for the damage caused by its communication to the property of another, unless it started through his negligence, or he failed to use ordinary skill and care in controlling or extinguishing it.'

"In Bishop's Non-Contract Law, at §833, that learned author says:

" 'Since fire, one of the most beneficent servants of man, does not from its own nature imperil surrounding persons and objects, the careful setting and keeping of it in one's dwelling-house, shop, field, or elsewhere, for a useful purpose, creates no liability to another injured by its spreading, through some accident not reasonably to be anticipated. But a fire set or looked after negligently, if by reason of such negligence it communicates to a neighbor's property and destroys it, will give the neighbor an action for the damages.'

"In this text it will be observed that it is at least inferentially stated that there may be negligence rendering an owner of premises liable in such cases regardless of how the fire starts upon his premises. The reports furnish but few instances of decisions being rendered wherein there is considered the question of the measure of the duty of a person on whose premises a fire is started by some agency for which he is not responsible to prevent its spread

to his neighbor's property. The decisions touching this exact question, however, seem to be in harmony in holding that there is a measure of responsibility on the part of an owner growing out of such a situation which requires him to use reasonable effort to prevent the spread of a fire occurring upon his premises, apart from his own act or neglect attending the starting of the fire, which may render him liable to his neighbor as for negligence."

This statement of common law was confirmed in *Lehman v. Maryott & Spencer Logging Co.,* 108 Wash. 319, 184 Pac. 323 (1919) where the court said:

> "The first question is whether the appellant was negligent in looking after the fire after it had been started [on appellant's lands] * * *. The rule in such cases is that one starting a fire on his own land is required to exercise reasonable care to prevent it from spreading to a neighbor's land. If, in this regard, he acts as a reasonably prudent person would have acted under like or similar circumstances, he is not guilty of negligence. On the other hand, if he fails to so act, he has not exercised that degree of care which the law requires of him and would be chargeable with negligence. * * * "

In holding for defendant, the court found there was no negligence.

Walters v. Mason County Logging Company, 139 Wash. 265, 246 Pac. 749 (1926), relied upon by the Government in the District Court, ruled in favor of a landowner who exercised ordinary care and was not negligent, the loss being due to an intervening cause not foreseeable or controllable. Contrary to the Government's contentions below, the *Walters* case supports

Rayonier's theory of duty. The court there said at page 271:

> "In the present case, the origin of the fire was known to be upon respondent's premises. The duty of respondent, after notice of the fire burning upon its property, was the same as if the fire had been set out by respondent itself. In other words, its duty, under the law announced in the *Jordan* case, *supra,* was to use all reasonable efforts to prevent the spread of the fire to the property of others. That is, also, a statutory duty. Rem. Comp. Stat., §5647 (P.C. §9131-41); *Burnett v. Newcomb,* 126 Wash. 192, 217 Pac. 1017." (R.C.W. 4.24.040.)

One who has a duty to prevent or extinguish fire originating on his lands must act as a prudent and careful person would do under like circumstances. In *Michigan Millers Mutual Fire Insurance Company v. Oregon-Washington Railroad and Navigation Company, et al,* 32 Wn.2d 256, 201 P.2d 207 (1948), the Washington Supreme Court, in holding a railroad liable for a clearing fire started on its right of way, said:

> "The railroads did not have sufficient equipment, nor a sufficient crew, and did not display the proper care and caution in 'handling and controlling such a destructive agency.' Under the circumstances, such lack of care constituted negligence."

See also *Wood & Iverson, Inc. v. Northwest Lumber Company,* 138 Wash. 203, 244 Pac. 712 (1926), confirmed on rehearing, 141 Wash. 534, 252 Pac. 98 (1927).

In the case at bar, the Forest Service failed to use sufficient men and equipment at all stages of the fire (R. 13, 14, 15, 17, 18, 19, 21, 22, 23, 24, 25, 26, 27, 28 and 29).

2. *Duty as volunteer.*

Even one who undertakes gratuitously to render services which he should recognize as possibly affecting the safety of another person's property is liable in tort if he fails to exercise reasonable care in the performance of said services. One whose property may be affected by services voluntarily undertaken by such a defendant is entitled to assume that the defendant will perform said services in a reasonably prudent manner and he may rely upon such assumption and hold the defendant liable for failure to exercise ordinary care.[6]

In a number of Federal Tort Claims cases, the United States was held liable for undertaking and assuming the performance of services.[7]

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[6] See 2 Restatement of the Law of Torts, §§497, 321, 323 and 325. See also Prosser on Torts, where that authority, at page 183, states the rule as follows:

"If the defendant's conduct threatens harm, which a reasonable man would foresee, to A, then he is negligent toward A, and by the great weight of authority he is liable for all damage resulting directly to A, even if the damage itself was not to be anticipated."

At page 194, Prosser goes on:

"Certainly a duty arises if he has deprived the plaintiff of the opportunity of protecting himself, or of the opportunity of obtaining aid, or some protection which a third person might have given him. It may be that in cases where the danger is extreme, the law would go beyond this, and find a duty whenever the affirmative conduct has begun to affect more or less directly and immediately the plaintiff's chances of escaping harm * * *."

[7] *Ure v. United States,* 93 F.Supp. 779 (D. Ore. 1950), where the Government assumed the operation and maintenance of a canal; *Brewer v. United States,* 108 F. Supp. 889(M.D. Ga. 1952), where the United States

In *P. Dougherty Co. v. United States,* 97 F.Supp. 287 (D. Dela. 1951) the United States was held liable for negligence of the Coast Guard when voluntarily and gratuitously rendering towing service to a distressed vessel. The court said, at page 292:

> "As Justice Cardozo said in *Glanzer v. Shepard,* 'It is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all.' In other words, the mere fact that the services are rendered voluntarily and without expectation of reward does not relieve the actor of the duty to exercise some degree of care. The general principle, as already stated, is that even a volunteer may be held liable not only for misconduct in rendering the services which he has undertaken to render, but also for negligence, to some degree at least."

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was held liable when it undertook the construction, maintenance and operation of a civilian swimming pool; *Union Trust Co. of District of Columbia v. United States,* 113 F.Supp. 80 (D.D.C. 1953), where the United States was held liable for negligence when it assumed the function of regulating air commerce and undertook the responsibility of regulating the flow of traffic at a public airport; *United States v. Gray,* 199 F.2d 239 (10th Cir. 1952), where the United States, notwithstanding the fact that it had no duty to care for the patient, undertook to treat the patient and, having done so negligently, was held liable for her injuries.

See also *Lacey v. United States,* 98 F.Supp. 219 (D. Mass. 1951), where the United States District Court for the District of Massachusetts said:

"It is true that, while the common law imposes no duty to rescue, it does impose on the Good Samaritan the duty to act with due care *once he has undertaken rescue operations.*" (Italics are the court's.)

3. *Duty greater with superior knowledge.*

The principles stated above apply a minimum standard for an ordinary defendant, but if, in fact, the defendant has superior knowledge, commensurately higher standards are required.[8]

B. Duty under Washington statutes.

Rem. Supp. 1945 §5806, R.C.W. 76.04.380, reads in part as follows:

> " * * * The owner * * * of land, on which a fire exists, or from which it may have spread, notwithstanding the origin or subsequent spread thereof on his own or other lands, shall make every reasonable effort to control and extinguish such fire immediately after receiving written notice to do so from the supervisor, or a warden or ranger; * * * "

The Government had actual and immediate notice (R. 13) of the fire on August 6, 1951, and undertook to act promptly (R. 14). Formal written notice would have been a vain and useless act. The Government contended below that the foregoing statute pertains only to collection by the state from the landowner of the cost of fighting fire. The contention is erroneous. The statute treats with several subjects, one of which is the imposition on the owner of land of the duty to make every reasonable effort to control and extinguish the fire on his land and to pursue and fight the fire on other lands.

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[8] "But if he has in fact knowledge, skill, or even intelligence superior to that of the ordinary man, the law will demand of him conduct consistent with it." Prosser on Torts, page 236, §36. See also 2 Restatement of the Law of Torts, §§289 and 290. The Forest Service employees had superior knowledge, being professional foresters.

Rem. Rev. Stat. §5807, R.C.W. 76.04.370, reads in part as follows:

> "Any land in the State of Washington covered wholly or in part by inflammable debris created by logging or other forest operations, land clearing and/or right of way clearing and which by reason of such condition is likely to further the spread of fire and thereby endanger life or property, shall, if so declared by the supervisor of forestry, constitute a fire hazard and the owner or owners thereof and the person, firm or corporation responsible for its existence, if such be not the owner, are required to abate such hazard under the general direction of the supervisor of forestry. * * * "

Other statutes involved include:

Rem. Rev. Stat. §2523, R.C.W. 76.04.220, which reads as follows:

> "Every person who shall wilfully or negligently set, or fail to carefully guard or extinguish any fire, whether on his own land or the land of another, whereby the timber or property of another shall be endangered, or who shall fail to respond to any lawful summons to aid in guarding or extinguishing any fire, shall be guilty of a misdemeanor."

Rem. Rev. Stat. §5818, R.C.W. 76.04.450, which reads as follows:

> "All forests and timber upon all lands in the state of Washington, lying west of a line one mile west of the eastern boundary of range ten west of the Willamette Meridian and north of the north boundary line of Grays Harbor county, shall be protected and preserved from the fire hazard to which they are or may be exposed by reason of the unusual quantity of fallen timber upon such lands.

> It shall therefore be unlawful for any person, firm, company or corporation, their officers, agents or employees, to do or commit any act which shall expose any of the forests or timber upon such lands to the hazard of fire."

All lands involved in the case at bar are within the area described in §5818.

Statutes dealing generally with the duties of landowners and others with respect to forest protection are collected in Chapter 76.04 of R.C.W.

C. The Government had a duty under its contract with the State of Washington to fight and suppress this fire[9]. It is immaterial whether Rayonier could sue the Government under the contract; the Government's duty to use ordinary care extends to Rayonier.

65 C.J.S. 349, relied upon below by the Government, in fact supports Rayonier's position, as follows:

> " * * * there are two distinct principles which may be invoked to fix liability for an injury from negligence in the performance of a contract obligation. The law may impose duties additional to those specified in a contract or independent of it, and one may owe two distinct duties in respect of the same thing, one of a special character to a particular individual, growing out of special relation to him, and another of a general character to those who would necessarily be exposed to risks or danger or loss through the negligent discharge of such duty. Privity of contract is not necessary where the duty which was breached, although connected with the subject matter of a contract, was not cre-

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[9] Examine paragraph VI of amended complaint (R. 6-7).

ated by contract, as in a case where one who has been employed to perform certain work is guilty of such negligence in connection with the performance thereof as to cause injury to a person other than his employer, or where the thing dealt with is inherently dangerous; a *fortiori,* privity of contract is not necessary where there is no contract relation.

"The governing rule is that, where a person undertakes to do an act or discharge a duty by which the conduct of another may be properly regulated and governed, he is bound to perform it in such a manner that those who are rightfully led to a course of conduct or action on the faith that the act or duty will be duly and properly performed shall not suffer loss or injury by reason of negligent failure so to perform it, and the nature and extent of the duty assumed by a person are factual matters to be established by proof of his actual conduct; and liability for negligence in the breach of this duty is in no way dependent on the existence of any privity of contract between the person guilty of the negligence, and the person suffering injury as a result thereof."[10]

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[10] This rule was approved by the United States Court of Appeals for the Ninth Circuit, in *Western Auto Supply Agency v. Phelan,* 104 F.2d 85 (9th Cir. 1939), and by the Washington Supreme Court in *Sheridan v. Aetna Casualty, etc., Co.,* 3 Wn.2d 423, 100 P.2d 1024 (1940). Prosser on Torts, page 206, §33, says:

"*Liability to Third Persons*

"The obligation of a contract runs only to the parties designated by the contract. If the defendant assumes a contract duty toward A, there is no logical basis upon which he may be compelled to perform that duty for B, unless the contract has been entered into expressly for the benefit of B, or A should happen to have assigned his rights. But by entering into the contract with A, the defendant may place himself in such

A private individual could have been party to a contract with the State of Washington similar to the above-mentioned contract to which the Forest Service was a party. Rem. Rev. Stat. §5784, R.C.W. 76.04.050, requires that the State Supervisor of Forestry "shall * * * co-operate in * * * forest fire fighting and patrol * * * with * * * the United States * * * and individuals within the state of Washington * * *." It is under authority of this statute that the state made the contract with the Forest Service. The Forest Service also is authorized to enter into such contracts, 16 U.S.C. §565.

D. Conclusion of Part II of Argument.

A duty was breached in each of the above respects, that is, under common law as a landowner and volunteer, under statutory requirements and under contractual requirements. A breach of any one of those duties would be adequate to support the claim. Even if this Court were to hold that any one or more of those duties did not exist, there would still be a claim if any one of them did exist and was breached.

The numerous breaches are described in the complaint (R. 26-29) and include knowingly permitting nuisance and fire hazardous conditions and practices on the Government's land, failure to prevent the fire, failure to contain and control the fire in each of its pre-

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a relation toward B that the law will impose upon him an obligation to act in such a way that B will not be injured. The action is not upon the contract, since B is a stranger to it; but the existence of the contract does not negative the responsibility of the defendant when he enters upon a course of conduct which may affect the interests of others."

liminary stages and failure to pursue and extinguish the fire, all with full knowledge of the dangerous conditions and risks involved and having full means at the disposal of the Government's employees to eliminate or minimize the risks. Rayonier was damaged (R. 29-33), and such damage was proximately caused by breach of the Government's duty to Rayonier (R. 29).

Clearly, if it were a private person who owned the land and whose employees were guilty of the acts and omissions described in the complaint, that person would be liable to Rayonier under the allegations of the complaint and under the law and statutes of the State of Washington. To date, we do not understand Government counsel to contend otherwise. The District Judge, in his remarks from the bench in ruling on the motion directed to the original complaint, stated that in his opinion there would be a duty on the Government and a proper claim stated except for the Judge's interpretation of *Dalehite v. United States,* 346 U.S. 15, 97 L.Ed. 1427, 73 S. Ct.956 (1953), and what he conceived to be governmental immunity under the *Dalehite* case because public employees were involved in fighting the fire (R. 41). The *Dalehite* case and the "public firemen" question are discussed later in this brief.

Part III.

Extent of Waiver of Sovereign Immunity

A. Immunity from tort liability is waived in sweeping language.

Congress has waived the sovereign immunity of the United States from liability for its torts by two sections of the Tort Claims Act. The broad waiver is limited only

by a third section. The sections waiving immunity are as follows:

28 U.S.C. §1346(b):

> "Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

The first paragraph of 28 U.S.C. §2674:

> "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

The courts have characterized the waiver of immunity as "clear and sweeping." In language followed by the 6th Circuit[11] and approved by the Supreme Court,[12] this Court, the Ninth Circuit, construed the Tort Claims Act as follows:

> " * * * The words of the Act indicate a clear and sweeping waiver of immunity. * * *

[11] *Old Colony Insurance Co. v. United States,* 168 F.2d 931 (6th Cir. 1948).

[12] *United States v. Yellow Cab Co.,* 340 U.S. 543, 95 L. Ed. 523, 71 S.Ct. 399 (1951).

> "The Government has premised its position largely on the principle that statutes in derogation of sovereign immunity must be strictly construed. Where a statute contains a clear and sweeping waiver of immunity from suit on all claims with certain well defined exceptions, resort to that rule cannot be had in order to enlarge the exceptions. * * * "[13]

In *United States v. Yellow Cab Co.*[14] the Supreme Court reasoned that in a case where there is no immunity from suit *by* the Government, the Government should not be clothed with immunity from suits by others *against* the Government. In dealing with the Government's contention for a construction of the statute that would have defeated the claim, the Court used the following language at page 554:

> "In argument before a number of District Courts and Courts of Appeals, the Government relied upon the doctrine that statutes waiving sovereign immunity must be strictly construed. We think that the congressional attitude in passing the Tort Claims Act is more accurately reflected by Judge Cardozo's statement in *Anderson v. Hayes Construction Co.,* 243 N.Y. 140, 147, 153 N.E. 28, 29-30: 'The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.' "

28 U.S.C. §§1346(b) and 2674 should be applied and interpreted in harmony with the present trend of legis-

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[13] *Employers' Fire Ins. Co. v. United States,* 167 F.2d 655, 656, 657 (9th Cir. 1948).

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[14] See note 12, *supra.*

lative policy and of judicial thought the direction of which is toward abandonment of the doctrine of sovereign immunity. The enactment of the Federal Tort Claims Act is conspicuously indicative of this trend and, in view of the Federal Government's proprietary interests and its progressively larger involvement in business in competition with private individuals and corporations, the Act is conspicuously wholesome.[15]

The recent cases continue to adhere to the foregoing rules of statutory interpretation. In *Gilroy v. United States,* 112 F.Supp. 664, 665-66 (D. D.C. 1953), the District Court for the District of Columbia, speaking through Holtzoff, District Judge, interpreted the Act as follows:

> "The purpose of the Federal Tort Claims Act was to abrogate the immunity of the United States against suit in tort. Its purpose was to make the United States liable to suit in tort in the same manner as anyone else. Unlike other statutes waiving governmental immunity, the Federal Tort Claims Act should be liberally construed in order to effectuate the purpose that was intended by its framers. The words, 'as a private individual', are not used as words of art or as a limitation, but, rather, in a

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[15] *United States v. Shaw,* 309 U.S. 495 at 501, 84 L.Ed. 888 at 892, 60 S.Ct. 659; *Keifer & Keifer v. Reconstruction Finance Corporation,* 306 U.S. 381 at 390, 391, 396, 397, 83 L.Ed. 784 at 789, 790, 793, 59 S. Ct. 516; *Federal Housing Administration v. Burr,* 309 U.S. 242 at 245, 84 L.Ed. 724 at 728, 60 S.Ct. 488; *Anderson v. John L. Hayes Construction Co.,* 243 N.Y. 140, 147, 153 N.E. 28. The latter case was cited with approval by this Court (9th Cir.) in *Employers' Fire Ins. Co. v. United States,* 167 F.2d 655 at 656 (9th Cir. 1948) mentioned above.

> descriptive manner to indicate that the United States should be liable in the same manner and to the same extent as anyone else."

This quotation was approved by the Court of Appeals for the Third Circuit in *O'Toole v. United States,* 206 F.2d 912, 918 (3rd Cir. 1953), decided by Biggs, Chief Judge of the Third Circuit, August 10, 1953, two months after the decision in the *Dalehite* case, which is discussed later in this brief.

B. Limitations on waiver of immunity.

Having waived immunity from tort liability in clear and sweeping language, Congress then defined in §2680 the only limitations on the waiver. That section is quoted in full in the Appendix to this brief. Subsections (b) to (m), inclusive, are obviously not applicable to the case at bar. If any part of §2680 is to be applied, it must be found in subsection (a). We say that subsection (a) does not apply. The Government says it does.

Section 2680(a) reads as follows:

> "The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> "(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

Analysis of subsection (a) shows that it deals with two different types of claim in which immunity is reserved.

1. *The first part of Section 2680(a).*

The first part of Section 2680(a) reads as follows:

> "The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> "(a) Any claim based upon an act or omission of an employee of the Government, *exercising due care,* in the *execution of a statute or regulation,* whether or not such statute or regulation be valid * * *." (Italics are ours)

It is patent that the first portion is not applicable to the case at bar because, first, the employees of the Government of whose acts and omissions we complain were not exercising due care, and second, their acts and omissions were not in the execution of a statute or regulation.

Neither does this case challenge the validity of any statute or regulation.

Therefore, if any part of Section 2680(a) is applicable, it must be found in the second part.

2. *The second part of Section 2680(a).*

The second part of Section 2680(a) reads as follows:

> "The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> "(a) Any claim * * * based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

This part of Section 2680(a) calls first for the meaning of "discretionary function" and then for a determination of whether a discretionary function is involved.

There is evolving a line, still somewhat hazy, which

defines the area of discretionary function. So far as pertinent to the case at bar the area of discretionary function ends at the "*determinations* made *by executives* or *administrators in establishing plans,* specifications or schedules of operations. Where there is room for policy judgment and decision * * *." *Dalehite v. United States, supra.* The Court then observed that, "It necessarily follows that *acts of subordinates* in carrying out the operations of government *in accordance with official directions* cannot be actionable." In holding the Government not liable, the court said, "The decisions held culpable were all responsibly made at a *planning* rather than *operational* level and involved considerations more or less important to the practicability of the * * * program." (Emphasis supplied.)

The quoted portions of the Supreme Court's opinion summarize the conclusions and distinctions made by the Courts of Appeal and District Courts in the construction of this rather new legislation.[16]

But once the policy determination has been made and the plan has been established by the executives and administrators, liability attaches to the tortious acts and omissions of employees at the operational level, and if they fail to carry out the plan as directed, or if in carrying out the plan they act in a negligent manner not directed or specified by the plan, then the Government is liable.

Thus in the following cases where plans have been determined, approved and ordered executed, the Gov-

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[16] See *Dalehite* opinion footnote 32 and cases hereinbelow cited.

ernment was held liable for tortious acts in the execution of the plan:

In *Smith v. United States,* 116 F.Supp. 801 (D. Dela. 1953), re-argued specially after the decision in the *Dalehite* case, and wherein it was held that the acts of subordinates which are done contrary to the plan or under no plan at all subject the Government to tort liability.

In *Ure v. United States,* 93 F.Supp. 779 (D. Ore. 1950), the Court acknowledged that the matter of planning and of constructing a large irrigation project is discretionary but that the operation of it after it has been completed and put into service does not involve a discretionary function.

See also the cases involving the malpractice of Government doctors in federal hospitals in which it is held consistently that the discretionary function is discharged upon the admission of the patient to the hospital and that thereafter the treatment of the patient is non-discretionary: *United States v. Gray,* 199 F.2d 239 (10th cir. 1952); *Costley v. United States,* 181 F.2nd 723 (5th Cir. 1950); *Griggs v. United States,* 178 F.2d 1 (10th Cir. 1949); *Dishman v. United States,* 93 F.Supp. 567 (D. Md. 1950).

Other cases include the military plane crash cases wherein the pilot's obvious and unusual discretion is not considered the kind of discretionary function that will preserve the government from liability: *United States v. Praylou,* 208 F.2d 291 (4th Cir. 1953), decided after the *Dalehite* case; *United States v. Gaidys,* 194

F.2d 762 (10th Cir. 1952); *United States v. Kesinger,* 190 F.2d 529 (10th Cir. 1951).

See also: *DeBonis v. United States,* 103 F.Supp. 123 (W.D. Pa. 1952); *Somerset Seafood Co. v. United States,* 193 F.2d 631 (4th Cir. 1951); and *Oman v. United States,* 179 F.2d 738 (10th Cir. 1949).

Applying the foregoing principles to the case at bar, it is clear from the complaint that the acts and omissions complained of were at an operational level. We do not complain of the executive or administrative decision to enter into the agreement between the State of Washington and the Forest Service, nor the establishment of the Forest Service Fire Protective Area (R. 6-7), nor the establishment of the Fire Suppression Plan (R. 16), nor in the Government's decision to acquire, hold and operate lands and timber for pecuniary gain and profit (R. 5-6).

Our complaint is that employees at the operational level failed to observe or carry out those plans as conceived and established by the executives and administrators, and that to the extent they acted under such plans, they did so in a negligent manner. The District Ranger and his assistants had no choice or discretion as to whether they would or would not oversee the Government's lands or whether they would or would not supervise and participate in fire fighting activities; that was their job and their duty. They were lax and negligent in the performance of their job.

In *Smith v. United States,* 117 F.Supp. 525 (N.D. Calif. 1953), plaintiff was camping on a Forest Service Area campsite when a rotten limb of a tree fell on him.

The United States was held liable because the Forest Service Rangers had not discovered and removed the dangerous limb. The court said, page 528:

> "Under the evidence it would appear that the defendant's employees were under a duty of ordinary care to eliminate dangerous conditions in the campsite area. The testimony of these employees indicated that they recognized that duty and purported to perform it. It further appears that by reason of their experience they were in a position to have superior knowledge of the conditions and they either failed to use ordinary care in ascertaining the dangerous condition of the campsite area or failed to use ordinary care in removing such dangerous condition."

From the foregoing, it is obvious that the second part of Section 2680(a) is not applicable because no discretionary function or duty is involved.

It is clear from the analysis so far made in this brief that (1) an individual in like circumstances would be liable for the acts and omissions complained of; (2) no part of 28 U.S.C. §2680 is applicable, and (3) if any sovereign immunity from these torts exists, it must be found outside the Federal Tort Claims Act. We thus come to consider the reasoning argued by Government counsel in the court below and expressed by the District Judge in granting the motion. This reasoning is premised wholly upon language used in part IV of the opinion in *Dalehite v. United States, supra,* which deals with the so-called "no analogous liability" theory, and with municipal immunity from liability for acts of public firemen. Neither of those theories is properly applied to the case at bar. Discussion of them follows.

Part IV

Dalehite v. United States

No Analogous Liability Theory—Public Firemen Theory

With reluctance and some misgivings (R. 37, 41, 55-57) the District Judge felt constrained to adopt the Government's argument and to dismiss the amended complaint because of the following language of the Supreme Court in *Dalehite v. United States*:[19]

> "As to the alleged failure in fighting the fire, we think this too without the Act. The Act did not create new causes of action where none existed before.
>
> " ' * * * the liability assumed by the Government here is that created by "all the circumstances," not that which a few of the circumstances might create. We find no parallel liability before, and we think no new one has been created by, this Act. Its effect is to waive immunity from recognized causes of action and was not to visit the Government with novel and unprecedented liabilities.' *Feres v. United States,* 340 U.S. 135, 142, 95 L.Ed. 152, 158, 71 S.Ct. 153.
>
> "It did not change the normal rule that an alleged failure or carelessness of public firemen does not create private actionable rights. Our analysis of the question is determined by what was said in the *Feres* case. See 28 U.S.C. §§1346 and 2674.
>
> "The Act, as was there stated, limited United States liability to 'the same manner and to the same extent as a private individual under like circumstances.' 28 U.S.C. §2674. Here, as there, there is no analogous liability; in fact, if anything is doctrinally sanctified in the law of torts it is the immu-

[19] 346 U.S. 15 at 43-44, 97 L.Ed. 1427 at 1444-1445, 73 S.Ct. 956.

> nity of communities and other public bodies for injuries due to fighting fire. This case, then, is much stronger than Feres. We pointed out only one state decision which denied government liability for injuries incident to service to one in the state militia. That cities, by maintaining fire-fighting organizations, assume no liability for personal injuries resulting from their lapses is much more securely entrenched. The Act, since it relates to claims to which there is no analogy in general tort law, did not adopt a different rule. See *Steitz v. Beacon,* 295 N.Y. 51, 64 N.E.2d 704, 163 A.L.R. 342. To impose liability for the alleged nonfeasance of the Coast Guard would be like holding the United States liable in tort for failure to impose a quarantine for, let us say, an outbreak of foot-and-mouth disease."

With due respect, we suggest that the quoted language was unnecessary to the *Dalehite* decision and that its implications will be discarded as precedent or authority in determining the Government's liability for torts.

It will be noted upon careful analysis that the above quote discusses two theories, neither of which is properly applied to the case at bar. One is the "no analogous liability" theory and the other is the principle of immunity of municipalities from liability for acts of municipally employed firemen. We discuss these points separately in this part of our argument.

A. The "no analogous liability" argument is inapplicable.

The "no analogous liability" argument is premised upon those portions of two statutes, 28 U.S.C. §§1346(b) and 2674, in which liability is imposed on the Government.

> " * * * under circumstances where the United States, *if a private person,* would be liable * * *."

and

> " * * * in the same manner and to the same extent *as a private individual* under like circumstances * * *." (Italics supplied)

The *Dalehite* opinion quotes from *Feres v. United States,*[20] and then proceeds from the *Feres* quotation.

The language of the court in the *Feres* case must be read in the light of the facts of that case. In the *Feres* case, the plaintiffs were members of the Armed Forces on active duty and not on furlough, and were damaged by other members of the Armed Forces likewise on active duty and acting in the line of duty. Traditionally, since the maintenance and operation of a national army is governmental in its purest sense, the law has always held that no member of the Armed Services on active duty may recover from the Government for negligence of others in the Armed Services on active duty. No private person could lawfully raise and maintain an army and hence no private person could lawfully be under like circumstances. Hence the above quotation from the *Feres* case is not inappropriate as applied to the facts in that case, for there could be no parallel or like circumstances.

But that is a far cry from a situation which involves Government employees at an operational level carrying out their duties in a proprietary activity of the Government and for whose acts there is commonplace, analogous, private and civilian activity and liability.

To apply the *Feres* quotation indiscriminately would

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[20] 340 U.S. 135, 142, 95 L.Ed. 152, 158, 71 S.Ct. 153.

almost nullify the Tort Claims Act in its entirety. For example, private persons do not and cannot own and operate a Post Office Department truck, yet the classic example given as one of the tortious acts of a Government employee for which the Government should be liable is an automobile accident involving a postal truck. Neither could a private individual own and operate military aircraft,[21] military combat vehicles,[22] a Coast Guard signal tower,[23] or an Air Force base.[24] Yet the Federal Government has been held liable for tortious acts of its employees in the performance of their duties in each such case.

Congress did not intend that immunity from liability be retained in situations where, simply from the nature of things, a private individual is not likely to be engaged in the same occupation. On the contrary, the Tort Claims Act says that if a private individual could be and were guilty of the same acts and omissions as those of the Federal employee complained of (regardless of whether the private person is likely to be doing those things), then the Federal Government will answer for torts of its employees. This intent has been recognized where the Government has been held liable under situations where a private person, acting in a private capacity, could not possibly be in an identical position,

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[21] *United States v. Praylou,* 208 F.2d 291 (4th Cir. 1953).

[22] *O'Toole v. United States,* 206 F.2d 912 (3rd Cir. 1953).

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[23] *McGill v. United States,* 200 F.2d 873 (3rd Cir. 1953).

[24] *Smith v. United States,* 116 F.Supp. 801 (D. Dela. 1953).

e.g., the shooting of a civilian by an Army guard,[25] the shooting of a civilian by a Federal border police guard,[26] torts by agents of the Federal Alcohol Tax Unit,[27] negligent or wrongful acts or omissions of Federal CAA employees,[28] the failure of the Navy to properly buoy a wreck.[29]

Sections 1346(b) and 2674 require the presumption that a private person could be performing many acts which, by their nature, and which, because of the many ramifications of our Government's activities, are not and for a long time have not been commonly engaged in by private persons.

There is nothing novel or unprecedented about the liability of a landowner under the law and statutes of the State of Washington for negligent acts and omissions of its employees.[30] There is nothing novel or unprecedented about the Government or its subdivisions being held liable for the unsafe condition of Government-owned property. There is nothing novel or unprecedented about Government liability for fires starting on Government-owned property.

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[25] *Cerri v. United States,* 80 F.Supp. 831 (N.D. Cal. 1948).

[26] *United States v. Stewart,* 201 F.2d 135 (5th Cir. 1953).

[27] *DeBonis v. United States,* 103 F.Supp. 123 (W.D. Pa. 1952). The government escaped liability on another ground.

[28] *Union Trust Co. of District of Columbia v. United States,* 113 F.Supp. 80 (D. D.C. 1953).

[29] *Somerset Seafood Co. v. United States,* 193 F.2d 631 (4th Cir. 1951).

[30] See our Argument, part II, *ante.*

In the following cases the courts have recognized that as a landowner or proprietor the United States had liabilities parallel and analogous to the liabilities of private landowners and proprietors:

Chesapeake & Ohio Railway Company v. United States, 139 F.2d 632 (4th Cir. 1944), where the United States, suing a private party, recovered fire fighting costs by virtue of the fact that it was a landowner.

Ure v. United States, 93 F.Supp. 779 (D. Ore. 1950), where the court used the following language in speaking of federal operation of an irrigation system:

> "A private person would be held upon the common law doctrine of trespass and upon the public policy which underlies the statute and the decisions of the Oregon Supreme Court. Under these circumstances, there is no reason why the United States should not be liable under the enactment subjecting the Government to tort liability."

Reconstruction Finance Corporation v. Childress, 186 F.2d 698 (8th Cir. 1950), where the court approved the following language:

> "If it [the government] comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there. * * * Generally, in respect to all the commercial business of the government, if an officer specially charged with the performance of any duty, and authorized to represent the government in that behalf, neglects that duty, and loss ensues, the government must bear the consequences of his neglect."

Ellison v. United States, 98 F.Supp. 18 (D. Nev. 1951), where the Federal Government, as the owner of

ranch lands in Nevada, was guilty for its wrongful diversion of waters.

Brewer v. United States, 108 F.Supp. 889 (M.D. Ga. 1952), where the Government as owner and operator of an Air Force base swimming pool was held to the same standard of care as private swimming pool proprietors.

Smith v. United States, 116 F.Supp. 801 (D. Dela. 1953), where a defective draining system in an Air Force installation damaged the lessee of lower riparian land and the United States was held liable in a manner analogous to and parallel with private upper riparian owners.

Bowden v. United States, 200 F.2d 176 (4th Cir. 1952), where the Government was sued on the theory that as the owner of land, on which there were located a Naval Air Station and an installation of the National Advisory Committee on Aeronautics, it had liabilities analogous to and parallel with those of a private landowner. The plaintiff did not succeed in recovering from the Government only because he failed to prove negligence as a matter of fact, not because his theory of recovery was invalid as a matter of law. See also *United States v. Bowers,* 202 F.2d 139 (5th Cir. 1953), where the court expressly assumed that the theory of liability founded upon proprietary duties analogous with and parallel to those of private landowners was valid under the Act.

McGill v. United States, 200 F.2d 873 (3rd Cir. 1953), where the Coast Guard was held liable for the death of a child who fell from an abandoned signal or watch

tower located on the real property owned by a New Jersey municipality but controlled by the Coast Guard.

State of Maryland, for Use of Pumphrey v. Manor Real Estate & Trust Co., 176 F.2d 414 (4th Cir. 1949), where the Government as owner and operator of an apartment house development was held responsible for the condition of the premises caused by rats.

Smith v. United States, 117 F.Supp. 525 (N.D. Calif. 1953) where the United States was held liable to a camper in Forest Service campsite for injuries caused by dead branch falling from tree.

As a final test of the "no analogous liability" theory in the case at bar, let us assume that the positions of the parties to this lawsuit were exactly transposed, that is, that the United States was the plaintiff and Rayonier the defendant, and that the conditions, acts and omissions described in the complaint were those created, tolerated or committed by Rayonier and its employees. It would enlighten this Court and us if Government's counsel would state whether there is any reason in fact or in law why the position of the parties could not be transposed in all material respects, and whether Rayonier would be liable to the United States. If the situation could be so transposed, and if Rayonier would be liable, then there can be no question but that in the case at bar there is analogous and parallel liability to meet any test that might be suggested under this theory.

Of significance and enlightenment is the case of *Bloedel Donovan Lumber Mills v. United States,* 74 F.Supp. 470 (Ct. Cl. 1947), decided by the Court of Claims on December 1, 1947, *certiorari* denied without opinion,

335 U.S. 814, 93 L.Ed. 369. In that case the plaintiff was awarded damages caused by fire which was set to burn slash at the direction of the same District Ranger Floe who is involved in the case at bar. Almost nine years to the day prior to the fire involved in our case, Ranger Floe insisted that a slash fire be set in this same general area under very similar weather conditions and in the face of similar wind and weather forecasts. His decision there was in the performance of his job as District Ranger and was just as much of a governmental and discretionary function as his job in the case at bar. Certainly if it had been felt that his act was in performance of a governmental or discretionary function, or if there was no analogous liability, or if this were a novel or unprecedented liability, the court would not have found for the plaintiff. Instead, the court said, page 477:

> "Naturally the defendant could not be held liable for ordinary mistakes or errors of judgment. These are inevitable. But viewing all the evidence and circumstances we cannot escape the conclusion that the action of Floe was either arbitrary or negligent and that defendant is responsible for the damages that reasonably could have been foreseen as the natural and probable result of the action taken."

B. The doctrine of municipal immunity from liability for acts of municipally employed firemen is not applicable.

The portion of the *Dalehite* decision quoted at the beginning of part IV of our Argument suggests that there should be extended to the Federal Government the same immunity from liability for acts of public firemen as exists under municipal law by which municipalities are

immune from liability for negligence of municipal firemen. We submit that any such pronouncement is *dictum,* is inept under the Federal Tort Claims Law, and in any event may not be applied to the facts and circumstances in this case.

1. *Facts in the Dalehite case indicate that "public firemen immunity" is not properly involved.*

As we get the facts of the *Dalehite* case from the reported opinions and from the briefs filed in the Supreme Court, the negligence complained of, so far as fire hazards and fire fighting activities are concerned, is generally as follows: Negligence was asserted in the plans and specifications adopted at policy-making and administrative levels for carrying out the Foreign Aid Program and the manufacture and distribution of fertilizer pursuant thereto. The Court held such negligence to be within the discretionary function exception, having been committed at executive or administrative level. The Coast Guard was asserted to have been negligent in failing to hunt for and discover the improper loading and storing aboard vessels of the explosive fertilizer which ultimately broke into flame, and in failing to do anything about fighting the fire after it started. From the facts appearing and from the arguments of Government counsel in their Supreme Court brief, it seems there could not have been negligence on the part of the Coast Guard, because one of the essential elements of actionable negligence was missing, namely, a duty. The property and ships involved were not owned by or subject to the control of the Government.[31] The

[31] *Dalehite v. United States,* 346 U.S. 15 at 22, 97 L.Ed. 1427 at 1434, 73 S.Ct. 956.

places where the ships were docked and loaded and caught fire were not under the supervision or jurisdiction of the Government. The fire prevention measures and the fire fighting activities complained of were under the supervision, direction and control of the local authorities and not of the Coast Guard or Federal Government. There was no statutory or regulatory duty imposed upon the Coast Guard which was unperformed. The Coast Guard's functions and participation were all intended to be permissive and not compulsory. Hence, there was no duty on the Coast Guard which would support an action for negligence.[32] For these reasons it was unnecessary for the Court to call upon principles of municipal law to support its ruling in favor of the Government.

2. *The principle of municipal immunity from liability arising out of governmental functions, including fire fighting, should not be extended to the Federal Government.*

In the *Dalehite* case, the Supreme Court said:

> " * * * in fact, if anything is doctrinally sanctified in the law of torts it is the immunity of communities and other public bodies for injuries due to fighting fire. * * * That cities, by maintaining fire-fighting organizations, assume no liability for personal injuries resulting from their lapses is much more securely entrenched. * * * "

Government's counsel argued, and the District Judge reasoned, on the strength of that quotation, that since

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[32] Supreme Court brief of the Government in *Dalehite v. United States, supra,* pp. 167-170, pp. 203-4. See also Petitioner's Supreme Court brief, pp. 232-236, and Petitioner's reply brief, p. 18.

the Forest Service employees were hired by the Government they were public employees and since some of the acts complained of were in connection with fire fighting, they were firemen, and hence public firemen; therefore —no liability on the Federal Government (R. 38-39).

Nowhere does the Tort Claims Act say that federal immunity shall be the same as or similar to the immunities of communities and cities. Section 2680 lists numerous acts and functions for which immunity from liability is expressly reserved to the Government. Some of those would normally be characterized as "governmental" functions if they concerned municipalities. If Congress had intended that immunity be retained in all instances where it exists in municipal law it would have said so in Section 2680, or it would have included in Section 1346(b) language somewhat as:

> "where the United States, if a private person *or a municipal corporation,* would be liable * * *."

The deliberate care with which the Federal Tort Claims Act was drafted and the experience which lay in other legislation which expressly waives federal immunity, preclude any possibility of inadvertent omission of a "governmental function" or "public firemen" immunity provision. The waiver of immunity is broad. The retention of immunities is specific. The liability of the United States is the same as that of an individual under like circumstances. The Supreme Court has said that the Federal Tort Claims Act

> " * * * suggests no reasons for reading into it fine distinctions between various types of such claims."[33]

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[33] *United States v. Yellow Cab Co.,* 340 U.S. 543, 95 L.

In *Somerset Seafood Co. v. United States,* 193 F.2d 631, (4th Cir. 1951), at 635, the court said:

"(4) It is suggested that it was not intended to impose liability on the United States for damages arising out of the exercise of what are essentially 'governmental' functions as distinguished from those which might be carried on by private individuals, but we think that there is no basis for such distinction. As was said by Judge Roche in *Cerri v. United States,* D.C. N.D. Calif., 80 F.Supp. 831, 833: 'The defense that this act does not apply to those cases wherein the negligence occurred during the exercise of a sovereign power of the United States, if heeded, would create a twilight zone of governmental activities in which the consent given by this statute could not be applied. Too numerous are the affairs of a purely governmental or sovereign nature, prohibited to or not duplicated by the activities of private individuals, to consider this to be the intent of Congress. Certainly, the statute itself makes no distinction between governmental activities of a sovereign nature and those of a proprietary nature, nor does it include within the claims exempted, 28 U.S.C.A. §943 (under revision of 1948, 28 U.S.C.A. §2680), those of this type.'

"The case is favorably discussed by Judge Yankwich in 9 F.R.D. 143, at page 156 where he says: 'In this respect, the opinion accords with the latest decisions of the Supreme Court which do not rec-

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Ed. 523, 71 S.Ct. 399 (1951). In *Cerri v. United States,* 80 F.Supp. 831 (N.D. Cal. 1948), in holding the government liable for negligent shooting of a civilian by an Army guard, the court refused to recognize a distinction between sovereign and proprietary functions because the Tort Claims Act makes no such distinction.

ognize in the law of public liability of the United States the distinction between governmental and other capacities. This was put very pithily by Mr. Justice Frankfurter in a well-known case: "Government is not partly public or partly private, depending upon the governmental pedigree of the type of a particular activity or the manner in which the Government conducts it." *Federal Crop Ins. Corp. v. Merrill,* 1947, 332 U.S. 380, 383, 68 S.Ct. 1, 92 L.Ed. 10.' And in *Keifer & Keifer v. Reconstruction Finance Corporation,* 306 U.S. 381, 391, 59 S.Ct. 516, 518, 83 L.Ed. 784, the Supreme Court, in holding that a governmental corporation's liability to suit is not to be inferred from whether it is or is not doing the government's work, said: 'Congress has provided for not less than forty of such corporations discharging governmental functions, and without exception the authority to-sue-and-be-sued was included. Such a firm practice is partly an indication of the present climate of opinion which has brought governmental immunity from suit into disfavor, partly it reveals a definite attitude on the part of Congress which should be given hospitable scope.' "

3. *Even if the principle of municipal immunity for acts of public firemen extends to the United States, such immunity does not exist as to the case at bar.*

Even if there be federal immunity based on "governmental" function as such, and hence, immunity from liability for acts of public firemen acting in performance of a governmental function, that is immaterial here for several reasons: (a) the Forest Service employees were not firemen; (b) its employees were not performing a governmental function but rather were engaged in a

"proprietary" function; (c) even if they were performing a governmental function, the United States still had a duty as landowner to fight, pursue and extinguish fire originating on its lands, and it is immaterial whether its failure to do so is the result of acts and omissions of public firemen or otherwise; and (d) the bases of liability alleged include unlawful, improper and negligent conditions and practices on Government lands prior to the time fire occurred and before firemen as such became involved.

(a) ***The Forest Service employees were not firemen.***

The District Ranger and his subordinates, of whom complaint is made, were caretakers of the Government lands involved. As such caretakers, their duties were many and varied, and included carrying out of forestry practices, observation and inspection of road construction and logging operations in timber being purchased from the United States, checking on hunters, fishermen and recreationists, giving information to the public and to persons interested in the district and its many features and activities, and in general acting as caretakers of the Government's land (R. 8). Their duties also required that they inspect and patrol the lands and other lands within the Forest Service Protective Area to discover, abate and eliminate conditions thereon which constituted fire hazards, to watch for the outbreak of fire, and when fire occurred within the area, to fight and use every reasonable effort to control and extinguish the same (R. 9). The Government did not own, maintain or operate a fire department or fire fighting organization as such in this area, but, just as

other owners and operators of timber and timberlands in the area, had men and equipment available to fight fires and knew where additional men and equipment to fight fires could readily and quickly be obtained (R. 17).

The janitor or custodian of any public building, or of any state or municipal liquor warehouse, or of a municipal carbarn, or of the restrooms provided for excursionists at the City of Seattle's Diablo Dam power development, should be alert to fire and fire hazardous conditions on the property in his custody. Is he for that reason a fireman? If fire breaks out in a waste basket and the custodian grabs the fire extinguisher and puts out the blaze (or fails to put it out), is he yet a fireman? Does the fact that a fire extinguisher hangs on the wall make him a fireman or the establishment a fire department? Does the frequency of fires have a bearing on the question? (The Court will take judicial notice, we believe, that forest fires do not occur very often.) It strains one's imagination and mental processes to say that a caretaker is a fireman or public fireman simply because his duties include good housekeeping and normal attention to fire danger when it occurs.

(b) ***The Forest Service employees were engaged in proprietary function of the Government.***

The Government lands on which the fire hazardous conditions and practices complained of existed, and in the Fire Protective Area for which the Forest Service employees were caretakers, were owned and operated by the Government for pecuniary gain and profit, and the timber thereon was held, managed, operated and administered upon to be sold to private parties for

cutting for industrial and commercial purposes, and for pecuniary gain and profit to the Government.

If, under or in spite of the Federal Tort Claims Act, it is proper to extend municipal law and the immunities thereunder to the Federal Government, then it is equally proper and logical to recognize the distinction made by municipal law between governmental and proprietary functions and the exceptions to municipal immunity from liability, which exceptions are just as "doctrinally sanctified" as the governmental immunity rule itself.

The law of municipal corporations and their liabilities has grown throughout the years under the peculiar wording of various state statutes and municipal charters, and under the doctrine of *stare decisis* peculiar to each jurisdiction, and through application of public policy peculiar to various geographical areas. What is doctrinally sanctified under the law of municipal corporations in any state is not, *ipso facto,* sanctified under the Federal Tort Claims Act to preserve federal immunity that Congress has abrogated in very sweeping terms. We have found no state statute waiving immunity which itemizes with such particularity the *sole* circumstances under which the immunity of the municipality or of the state will be preserved such as we find in the Federal Tort Claims Act.

The Supreme Court in the *Dalehite* case was cognizant of the exceptions to the general common law rules because the case of *Steitz v. Beacon,* 295 N.Y. 51, 64 N.E.2d 704, 163 A.L.R. 342, which it cites, clearly

recognizes an exception to municipal immunity doctrinally sanctified in New York.

The introductory paragraph of Section 746 on Municipal Corporations, 63 C.J.S. 29, states the general rule as follows:

> "Although the doctrine is repudiated by some authorities, generally a distinction is made between the public or governmental functions of a municipal corporation on the one hand, and the private, corporate, or proprietary functions on the other; and liability is generally imposed for torts committed in the exercise of the latter functions, but not for those committed in the exercise of the former."

That section then goes on to state that some authorities hold all functions of a municipal corporation are of a public or governmental nature, for which the municipality is not liable in tort, and other authorities hold that a municipal corporation should be liable for its torts regardless of the nature of the function involved. It then states that the great weight of authority holds as stated in the above quotation.

Further citation of authority seems unnecessary. With few exceptions, negligence occurring in a proprietary functions is actionable. Even beyond that, municipal liability is not uncommon in negligence cases arising out of governmental or semi-governmental activities, as for example, liability for unsafe street conditions, water system failures, sewage and drainage defects, and automobile accidents where the automobiles are engaged in various pursuits. The extent of liability and immunities therefrom are frequently influenced or controlled by local statutes, charters and ordinances.

Municipal liability varies from state to state and is subject to statutory and judicial modification. Even within one state, as in the State of Washington, there may be variations in liabilities and immunities of different classes of municipal corporations and political subdivisions. For example, in Washington there is in effect the following statute, Rem. Rev. Stat. §951, RCW 4.08.120:

> "§951. *Actions against public corporations.* An action may be maintained against a county, or other of the public corporations mentioned or described in the preceding section [county, incorporated town, school district or other public corporation of like character in this state] either upon a contract made by such county or other public corporation in its corporate character, and within the scope of its authority, or for an injury to the rights of the plaintiff arising from some act or omission of such county or other public corporation. (L. 69, p. 154, §602; Cd. '81, §662; 2 H.C. §672)."

This statute has been interpreted so that it is now inapplicable to cities, but the waiver of immunity with respect to counties, even in their performance of governmental functions as distinguished from proprietary functions, has been affirmed in *Whiteside v. Benton County,* 114 Wash. 463, 195 Pac. 519 (1921).

We observe parenthetically that the confusion and uncertainty as to tort liability of the United States which would necessarily result from extension of principles of municipal law, is another sound and solid reason why the Federal Courts should adhere strictly to the wording of the Federal Tort Claims Act.

(c) ***The United States had a duty as landowner to fight, pursue and extinguish fires originating on its lands. That duty is unaffected by the acts or omissions of public firemen.***

The Washington statutes and general law imposing duties and obligations on landowners are discussed in Section B of Part II of this Argument, *ante.*

If the United States has duties as a landowner, those duties must be discharged, and failure to perform them gives rise to liability. It does not matter if the unlawful or negligent condition of the property is the result of an act or omission performed, tolerated or created in the exercise of a governmental function.

See:

Sprague v. City of St. Louis, 251 Mo. 624, 158 S.W. 16 (1913), where the city was held liable when plaintiff was injured by stumbling over a water hose in the street, which hose was being used by city employees in washing one of its sewers, a governmental function.

Hillstrom v. City of St. Paul, 134 Minn. 451, 159 N.W. 1076 (1916), where the city was held liable as a proprietor for the death of a boy caused by the falling of a rotted pole, the exclusive purpose of which was to support a fire alarm system, a governmental function.

State v. City of Marshfield, 122 Ore. 323, 259 Pac. 201 (1927), where the State of Oregon recovered from the city the cost of fighting a forest fire which had its origin upon city lands.

Crandall v. City of Amsterdam, 280 N.Y. 527, 19 N.E.2d 926 (Court of Appeals, New York, 1939), affirming *per curiam* 254 App. Div. 39, 4 N.Y.S.2d 372, where the city was held liable for personal

injuries when plaintiff fell on an icy sidewalk, which ice was created by water being played on a fire by city firemen.

Osborn v. City of Whittier, 103 Cal. App.2d 609, 230 P.2d 132 (1951), where the city was held liable for damage from fire spreading from a garbage dump, even though dumping and burning of garbage was a governmental function.

(d) *The Government is liable because of unlawful, improper and negligent conditions and practices on Government lands prior to the outbreak of fire.*

The statutes and law of the State of Washington concerning fire hazardous and fire prevention conditions and practices on lands was discussed in Section B of Part II of this Argument, *ante.* The Government lands on which the fire originated on August 6, 1951, had for a number of years prior thereto been covered with trees of various sizes, standing and down, accumulations of rotten ties, logging and land clearing debris, and inflammable growing grasses and bushes (R. 11-12). This was contrary to the statutes cited. The Government knowingly permitted the Port Angeles Western Railroad to operate defective equipment over Government lands and not to have its trains followed by a speeder or other equipment with men watching for fires (R. 11-13). This was contrary to the statutes cited. The fire would not have started except for those fire hazardous conditions and practices, and the same were a direct and proximate cause of all events which followed, including damage to Rayonier's property (R. 29). Prior to noon on August 6, 1951, there was no fire fighting and there were no firemen involved. The most that can

be said was that the District Ranger and his subordinates, who at times donned firemen's hats, failed to abate the hazardous conditions and practices, but that could be no excuse for avoiding the Government's obligations and responsibilities as a landowner.

CONCLUSION

The United States Government is big and getting bigger. Whether we like it or not, it is increasingly active in business and industry and commerce. Its activities are often in direct competition with private enterprise and enter into and affect the flow of commerce. Government employees have jobs and duties and functions identical to those of employees of private concerns and they make the same mistakes and cause like injury.

It was in this climate of participation by Government that the Federal Tort Claims Act evolved. There was and is a definite need for it by every legal, political, economic, humane and just standard of this country. If Government elects to hold its lands and timber and to operate them for purposes of profit, then the Government should be held to the same rules of conduct and the same standards of responsibility as are exacted of its citizens who are in the same business. And a Government employee should have no license to be careless or negligent simply because he is a public rather than a private servant. If one's toe is stepped on, it hurts just as much whether the trespasser draws his paycheck from the Government or from General Motors. Fire burns with the same devastation whether it starts on one side of a section line or the other.

Recognizing the deteriorating effect on personal con-

duct which immunity from liability tends to create, and recognizing the unfairness to citizens who were left without recourse for damage caused by the United States and its employees while carrying on activities similar to those carried on by citizens, Congress passed the Tort Claims Act, thereby intending to put the Government on a parity with its citizens. The courts would do a grave injustice both to Congress and to the citizens if they inject into the law immunities which are not clearly and specifically retained by the statute.

In the case at bar, the Government owns lands and timber just as do Rayonier and other private parties in the area. The Government manages and operates that land and timber for profit just as do the private owners (R. 5-6). It has employees to look after that timber just as do private owners, and its employees go about their work doing the same chores and having the same opportunities for doing a good, bad or indifferent job as employees of private owners (R. 8-10). Forest Service employees and private employees work shoulder to shoulder, so to speak, because Forest Service timber and private timber are intermingled, and what is good or bad for one stand of timber is equally good or bad for the other timber in the area.

Whether it was a matter of expediency or policy, it so happens that the Forest Service committed itself to take charge in case of fire (R. 6-7). If the Forest Service had not done so it could have been Rayonier or some other company or an association of private timber owners which undertook that responsibility, as both State and Federal agencies are authorized by statute to

make arrangements with private parties as well as with State and Federal authorities to set up fire protection procedures. 16 U.S.C. §565; Rem. Rev. Stat. §5784; R.C.W. 76.04.050. The Fire Suppression Plan of the Forest Service was similar to that which most private owners establish for themselves, for private owners recognize the primary responsibilities which attach to them as owners and the losses which they will sustain if fire occurs on their property. All such plans recognize the inadequacy of the men and equipment of just one party to cope with a major fire, but they contemplate the co-operation of neighbors to furnish men and equipment to fight the common enemy (R. 16-17). That practice is common in the industry, and the Government in this case is a part of that industry.

This case should be a clear and simple one, where Rayonier is holding its neighbor responsible and accountable for failing to conduct itself in the same manner as the neighbor expects Rayonier to act, and for which the neighbor would look to Rayonier for redress, were the situations reversed.

We respectfully suggest that the District Court erred in dismissing the amended complaint, and ask the Court of Appeals to reverse the order appealed from.

Respectfully submitted,

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APPENDIX A

28 U.S.C. §2680

"§2680. *Exceptions.*

"The provisions of this chapter and section 1346(b) of this title shall not apply to—

"(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

"(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

"(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

"(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

"(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

"(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

"(g) Repealed. Sept. 26, 1950, c. 1049, §13(5), 64 Stat. 1043.

"(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

"(i) Any claim for damages caused by the fiscal op-

erations of the Treasury or by the regulation of the monetary system.

"(j) Any claim arising out of the combatant activities of the military or naval forces or the Coast Guard, during time of war.

"(k) Any claim arising in a foreign country.

"(l) Any claim arising from the activities of the Tennessee Valley Authority.

"(m) Any claim arising from the activities of the Panama Canal Company. As amended Sept. 26, 1950, c. 1049, §§2(a), 13(5), 64 Stat. 1038, 1043."

16 U.S.C. § 565

"§565: *Co-operation by Secretary of Agriculture with State officials in protection of timbered and forest-producing lands from fire; limitation on amount of expenditures by United States.*

"If the Secretary of Agriculture shall find that the system and practice of forest-fire prevention and suppression provided by any State substantially promotes the objects described in section 564 of this title, he is hereby authorized and directed, under such conditions as he may determine to be fair and equitable in each State, to co-operate with appropriate officials of each State, and through them with private and other agencies therein, in the protection of timbered and forest-producing lands from fire. In no case other than for preliminary investigation shall the amount expended by the Federal Government in any State during any fiscal year, under this section, exceed the amount expended by the State for the same purpose during the same fiscal year, including the expenditures of forest owners or operators which are required by State law or which are made in pursuance of the forest-protection system of the State under State supervision, and the Secretary of

Agriculture is authorized to make expenditures on the certificate of the State forester, the State director of extension, or similar State official having charge of the co-operative work for the State, that State and private expenditures as provided for in this section have been made. In the co-operation extended to the several States due consideration shall be given to the protection of watersheds of navigable streams, but such co-operation may, in the discretion of the Secretary of Agriculture, be extended to any timbered or forest-producing lands or watersheds from which water is secured for domestic use or irrigation within the co-operative States. As amended July 25, 1947, c. 327, §1, 61 Stat. 449."

APPENDIX B

Washington Statutes Involved

Rem. Rev. Stat. § 2523; RCW 76.04.220:

"*Negligent fires.* Every person who shall wilfully or negligently set, or fail to carefully guard or extinguish any fire, whether on his own land or the land of another, whereby the timber or property of another shall be endangered, or who shall fail to respond to any lawful summons to aid in guarding or extinguishing any fire, shall be guilty of a misdemeanor." (L. '09, p. 974, § 271.)

Rem. Rev. Stat. § 5647; RCW 4.24.040:

"*Damages for negligently permitting fire to spread.* If any person shall for any lawful purpose kindle a fire upon his own land, he shall do it at such time and in such manner, and shall take such care of it to prevent it from spreading and doing damage to other persons' property, as a prudent and careful man would do, and if he fail so to do he shall be liable in an action to any person suffering damage thereby to the full amount of such damage." (L. '77, p. 300, § 3; Cd. '81, § 1226.)

Rem. Rev. Stat. § 5649; RCW 4.24.060:

"*Common-law rights not abrogated.* The common-law right to an action for damages done by fires is not taken away or diminished by this act, but it may be pursued notwithstanding the fines or penalties set forth in sections 5651 and 5652; but any person availing himself of the provisions of section 5647 shall be barred of his action at common law for the damage so sued for and no action shall be brought at common law for kindling fires in the manner described in the last section; but if any such fires shall spread and do damage, the person who kindled the same and any person present and concerned in driving such lumber, by whose act or neglect such fire is suffered to spread and do damage, shall be

liable in an action on the case for the amount of damages thereby sustained." (L. '77, p. 300 § 6; Cd. '81, § 1229.)

Rem. Supp. 1941 § 5794; RCW 76.04.250, RCW 76.04.260, RCW 76.04.270:

"Closed season—Operating of locomotive, gasoline engines, etc.—Spark arrestors—Fire fighting equipment—Common carrier railroad companies—Patrols—Penalties. It shall be unlawful for anyone to operate within one-quarter (¼) of one (1) mile of any forest area during the closed season:

(a) Any spark-emitting railroad logging locomotive, logging or farming engine or boiler or any spark-emitting locomotive, without such railroad or logging locomotive being equipped with and uses a safe and suitable device for arresting sparks, a suitable power pump of not less than 3" x 2" x 3" with discharge air chamber, or equivalent pump, three hundred (300) feet of hose not less than one (1) inch in diameter equipped with a standard nozzle, three (3) axes, six (6) shovels, one (1) five (5) gallon hand pump, two (2) bucking saws and six (6) mattocks or the serviceable equivalent to such tools. The hand equipment must be kept in a sealed box, ready for instant use on or adjacent to such locomotive, logging engine or farm engine: *Provided,* That no such railroad locomotive, logging or other engine or boiler shall be operated by anyone without being equipped with adequate device to prevent the escape of fire or live coals or other burning substance from all ash pans, and all fire boxes, except when ash pans or fire boxes are being cleaned when not in motion. Any donkey boiler, when equipped to operate without the use of exhaust steam within the stack, and without any artificial means of creating a forced draught, shall not require a spark arrestor;

"(b) Any gasoline or diesel yarding, skidding, or

loading engine, unless such yarding, skidding, or loading engine is provided with two (2) chemical fire extinguishers of not less than one-half (½) gallon capacity each, three (3) axes, six (6) shovels, one (1) five (5) gallon hand pump, two (2) bucking saws, and six (6) mattocks or the serviceable equivalent to such tools. The hand equipment must be kept in a sealed box ready for instant use on or adjacent to such yarding, skidding, or loading engines;

"(c) Any tractor, unless such tractor is equipped with a chemical fire extinguisher of not less than one (1) quart capacity;

"(d) Any truck hauling forest products from any forest area, unless such truck is equipped with a chemical fire extinguisher of not less than one (1) quart capacity, one (1) axe and one (1) shovel;

"(e) Any gasoline or diesel engine, unless such engine has the exhaust pipe outlet pointed upward to a minimum angle of forty-five (45) degrees from the horizontal or is equipped with a suitable device for arresting sparks.

"All logging locomotives shall be equipped with a sprinkler system which shall be capable of wetting the tracks and at least two (2) feet on either side of each rail. Such sprinkler system shall be manually controlled from the cab. The water supply tank for such sprinkler shall be capable of carrying an adequate supply of water in direct relation to the mileage of track covered and the available water supply.

"It shall be unlawful for common carrier railroad companies to operate trains through forested districts unless such trains are followed by a speeder patrol at such times and in such places as the State Supervisor of Forestry may designate, each patrol to be equipped with a five (5) gallon fire extinguisher, two (2) shovels

and an axe. In case a railroad company fails to provide patrol as required, the State Supervisor of Forestry is hereby authorized to employ patrolmen for such purpose and the railroad company concerned shall be liable for the expense of the same to be collected in a civil suit brought by the state against said railroad company.

"It shall be unlawful for any logging locomotive to operate through a hazardous fire area, consisting of unburned slashings, during any period of fire weather unless the movements of such locomotives are followed by a speeder or other patrol. Where speeder patrol is used, such speeder shall be equipped with two (2) shovels, one (1) axe, and a one (1) five (5) gallon hand tank pump filled with water.

"Every person violating the provisions of this section shall upon conviction be punished by a fine of not less than twenty-five dollars ($25), nor more than seventy-five dollars ($75) and the judgment of the court, in case of conviction, shall prohibit such person from operating such train, railroad locomotive, logging locomotive or other engine or boiler until the requirements of this section have been complied with." (Am. L. '41, ch. 63, § 1.)

Rem. Rev. Stat. § 5795; RCW 76.04.280:

"*Railroads—Fire on right of way.* No one operating a railroad shall permit to be deposited by his, or its, employees, and no one shall deposit during the closed season, fire or live coals upon the right of way outside of the yard limits, and within one-quarter of one mile of any forest material, without such deposit of fire or live coals shall be immediately extinguished.

"Anyone violating the provisions of this section respecting the deposit of fire or live coals, shall upon conviction pay a fine of not less than twenty-five dollars ($25), nor more than one hundred dollars ($100) or be

imprisoned in the county jail not exceeding thirty (30) days.

"Wardens and rangers shall report any lack of sufficient spark-arrestors, and any lack of adequate devices for preventing the escape of fire and live coals, as provided in this act, to the forester, and to the prosecuting attorney of their county, and the superior court of that county where suit is first instituted, shall have jurisdiction of the offence." (L. '11, p. 634, § 15.)

Rem. Rev. Stat. § 5795-1; RCW 76.04.290:

"Public carriers—Report of fires. Railroad companies and other public carriers, or any person or persons, operating through forested districts, must report forthwith by telephone or telegraph any fires on or adjacent to their right of way or route, to the local fire-warden or to the office of the state supervisor of forestry." (L. '23, p. 622, § 7.)

Rem. Rev. Stat. § 5796; RCW 76.04.310:

"Burnings on right of way—Permits—Public work. Everyone clearing right of way for railroad, public highway, private road, ditch, dike, pipe or wire line, or for any other transmission, or transportation utility right of way, shall pile and burn on such right of way all refuse, timber, brush and debris cut thereon, as rapidly as the clearing or cutting progresses, or at such other times as the forester, or his authorized representatives may specify, and if during the closed season, in compliance with the law requiring burning permits. No one clearing any land or right of way, or in cutting or logging timber for any purpose, shall fell, or permit to be felled, any trees so that they may fall on to land owned by another, without first obtaining permission from such owner in addition to complying with the terms of this section for the disposal of refuse. All the terms of this section and other forest laws of the state

shall be observed in all clearings of right of way or other land on behalf of the state itself or any county thereof, either directly or by contract; and unless unavoidable emergency prevents, provision shall be made by all officials directing such work for withholding a sufficient portion of the payment therefor, until the piling and burning is completed, to insure the completion of the piling and burning in compliance with the provisions of this section." (L. '17, p. 106, § 3. Cf. L. '11, p. 634, § 16.)

Rem. Rev. Stat. § 5803; RCW 76.04.340:

"*Destruction of forests by fire.* Any person or persons who shall wilfully and deliberately set fire to any forest within the state, or in any place from which fire may be communicated to any such forest, or who shall accidentally set fire to any such forest, or to any place from which fire may be communicated to any such forest, and shall not extinguish the same or use every effort to that end, or who shall build any fire for lawful purposes or otherwise in or near any such forest, and through carelessness or neglect shall permit said fire to extend to and burn through such forest, shall be deemed guilty of a misdemeanor, and on conviction before a court of competent jurisdiction shall be punishable by fine not exceeding one thousand dollars ($1000) or imprisonment not exceeding one year, or by both such fine and imprisonment." (L. '23, p. 623, § 9; L. '91, p. 226, § 1; 2 H.P.C., § 84a.)

Rem. Supp. 1941 § 5804; RCW 76.04.350:

"*Owners to protect against fires—Exception.* Every owner of forest land in the State of Washington shall furnish or provide therefor, during the season of the year when there is danger of forest fires, adequate protection against the spread of fire thereon or therefrom which shall meet with the approval of the State Forest Board: *Provided,* That for the purposes of this

section forest lands, lying in counties east of the summit of the Cascade mountains, shall be deemed to be adequately protected where patrol is furnished by the United States forest service of a standard and efficiency and seasonal duration, deemed by the State Forest Board to be sufficient for the proper protection of the forest land of such counties." (Am. L. '41, ch. 168, §2.)

Rem. Supp. 1945 § 5806; RCW 76.04.380:

"Uncontrolled fire as nuisance—Liability for abatement—Lien for cost of abatement—Logging operation fires. Any fire on any forest land in the State of Washington burning uncontrolled and without proper action being taken to prevent its spread, notwithstanding the origin of such fire, is hereby declared a public nuisance by reason of its menace to life or property. The owner, operator and/or person in possession of land, on which a fire exists, or from which it may have spread, or either or any of them, notwithstanding the origin or subsequent spread thereof on his own or other land, hereby is required to make every reasonable effort to control and extinguish such fire immediately after receiving written notice to do so from the forester, or a warden, or ranger; and if such owner, operator and/or person in possession shall refuse, neglect or fail to do so, the supervisor of forestry or any fire warden or forest ranger acting with his authority shall summarily abate the nuisance thus constituted by controlling or extinguishing the fire and the cost thereof may be recovered from such owner, operator and/or person in possession of land and, if the work is performed on the property of the offender, shall also constitute a lien upon said property and/or chattels under his ownership. Such lien may be filed by the Supervisor of Forestry in the office of the county auditor and foreclosed in the manner provided by law for the foreclosure of liens for labor and material. It shall be the duty of

the prosecuting attorney for the county to bring such action for debt, or to foreclose such lien, upon the request of the supervisor of forestry.

"When a fire occurs in a logging operation, such fire shall be fought to the full limit of available employees, as may be necessary, and such fire fighting shall be continued with the necessary crews in such numbers as are, in the opinion of the state forester, or his authorized deputies, sufficient to bring such fire to a patrol basis, and such fire shall not be left without such fire fighting crew or fire patrol until authority so to do has been granted in writing by the supervisor of forestry, or his authorized deputies." (Am. L. '45, ch. 99, § 1, p. 271.)

Rem. Rev. Supp. § 5807; RCW 76.04.370:

"Cut-over lands as public nuisance—Abatement—Cost as lien—Notice before suit—Excepted lands. Any land in the State of Washington covered wholly or in part by inflammable debris created by logging or other forest operations, land clearing, and/or right of way clearing and which by reason of such condition is likely to further the spread of fire and thereby endanger life or property, shall constitute a fire hazard, and the owner or owners thereof and the person, firm or corporation responsible for its existence are required to abate such hazard. Nothing in this section shall apply to lands for which a certificate of clearance, under section 2 of chapter 207, Laws of 1929 (section 5792-1 of Remington's Revised Statutes; section 2569-1 of Pierce's Code), has been issued.

"If the owner or person, firm or corporation responsible for the existence of any such hazard shall refuse, neglect or fail to abate such hazard, the state supervisor of forestry may summarily cause it to be abated and the cost thereof and of any patrol or fire fighting made necessary by such hazard may be recovered from said

person, firm or corporation responsible therefor or from the owner of the land on which such hazard existed by an action for debt and said costs shall also be a lien upon said land and may be enforced in the same manner, with the same effect and by the same agencies as the lien provided for in section 3 of chapter 105, Laws of 1917 (section 5806 of Remington's Revised Statutes; section 2581 of Pierce's Code): *Provided,* That said summary action hereinbefore referred to may be taken only after twenty (20) days' notice in writing has been given to the owner or reputed owner of the land on which the hazard exists either by personal service on said owner or by registered letter addressed to said owner at his last known place of residence." (L. '39, ch. 58, § 1, p. 171.)

Rem. Rev. Stat. § 5808; RCW 76.04.400:

"*Co-operative protection by timber owners.* When any responsible protective agency or agencies composed of timber owners other than the state shall agree to undertake systematic forest protection in co-operation therewith and such co-operation shall appear more advantageous to the state than the maintenance of the independent system provided elsewhere by law, the state forester may, with the approval of the state board of forest commissioners, designate suitable areas to be official co-operative districts and substitute thereto whenever necessary, in place of the county wardens elsewhere provided by law, such district wardens, with such district headquarters and duties, as may be agreed upon by him and by the co-operating agencies to render such co-operation most effective. He may also co-operate in the compensation of such wardens, or in the payment of other expenses for the prevention and control of fire in such official fire districts, to such extent as the board of forest commissioners may deem equitable on behalf of the state, and claim for such payments shall be

the prosecuting attorney for the county to bring such action for debt, or to foreclose such lien, upon the request of the supervisor of forestry.

"When a fire occurs in a logging operation, such fire shall be fought to the full limit of available employees, as may be necessary, and such fire fighting shall be continued with the necessary crews in such numbers as are, in the opinion of the state forester, or his authorized deputies, sufficient to bring such fire to a patrol basis, and such fire shall not be left without such fire fighting crew or fire patrol until authority so to do has been granted in writing by the supervisor of forestry, or his authorized deputies." (Am. L. '45, ch. 99, § 1, p. 271.)

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"If the owner or person, firm or corporation responsible for the existence of any such hazard shall refuse, neglect or fail to abate such hazard, the state supervisor of forestry may summarily cause it to be abated and the cost thereof and of any patrol or fire fighting made necessary by such hazard may be recovered from said

person, firm or corporation responsible therefor or from the owner of the land on which such hazard existed by an action for debt and said costs shall also be a lien upon said land and may be enforced in the same manner, with the same effect and by the same agencies as the lien provided for in section 3 of chapter 105, Laws of 1917 (section 5806 of Remington's Revised Statutes; section 2581 of Pierce's Code): *Provided,* That said summary action hereinbefore referred to may be taken only after twenty (20) days' notice in writing has been given to the owner or reputed owner of the land on which the hazard exists either by personal service on said owner or by registered letter addressed to said owner at his last known place of residence." (L. '39, ch. 58, § 1, p. 171.)

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approved and paid in the manner prescribed for claims outside such co-operative districts." (L. '17, p. 351, § 5.)

Rem. Supp. 1949 § 5817-1; RCW 76.04.410:

"*Contracts and undertakings for protection and development of forests authorized.* The State Supervisor of Forestry shall, subject to the approval of the Director of the Department of Conservation and Development, have power, subject to the provisions hereof, to enter into contracts and undertakings with private corporations or rural fire protection districts for the protection and development of the forests or any designated forest area within the state." (Am. L. '49, ch. 141, § 1.)

Rem. Rev. Supp. § 5817-2; RCW 76.04.420:

"*Contracts by corporations.* Any private corporation organized and existing under the laws of this state, or organized under the laws of any other state and legally qualified to transact business in this state, may, where its articles of incorporation or charter so provide, contract with the state supervisor of forestry for the purposes provided for in section 5817-1 hereof." (L. '33, p. 273, § 2.)

Rem. Rev. Supp. § 5817-3; RCW 76.04.430:

"*Articles of incorporation — Provisions required.* Before any such private corporation shall be qualified to enter into any such contract, there shall be incorporated into the articles of incorporation or charter of such corporation a provision limiting the dividends which are by law payable to the stockholders thereof and such corporation shall, out of its earnings or earned surplus, and in a manner satisfactory to the state supervisor of forestry, provide for the annual setting apart of a fund or funds to discharge any contract entered

into between such corporation and the said state supervisor of forestry relating to said matters." (L. '33, p. 273, § 3.)

Rem. Rev. Supp. § 5817-4; RCW 76.04.440:

"*Contracts for protection and development—Requisites.* Any undertaking for the protection and development of the forests of the state under this act shall be regulated and controlled by a contract to be entered into between said qualified private corporation and the state supervisor of forestry, such contract to outline the lands involved and the conditions and details of said undertaking, including an exact specification of the amount of funds to be made available by said corporation and the time and manner of the disbursement thereof: *Provided, however,* That before entering into any such contract, the state supervisor of forestry shall be satisfied that said private corporation is financially solvent and will be able to carry out the project outlined in said contract: *And provided further,* That the state supervisor of forestry shall have charge of the project for the protection and development of the forest area described in such contract, and that any expense incurred by said state supervisor of forestry under any such contract shall be payable solely by said corporation from the fund or funds provided by it for said purposes, and that the state of Washington shall not in any event be responsible to any person, firm, company or corporation for any such indebtedness thereby created." (L. '33, p. 274, § 4.)

Rem. Rev. Stat. § 5818; RCW 76.04.450:

"*Forest and timber protected.* All forests and timber upon all lands in the state of Washington, lying west of a line one mile west of the eastern boundary of range ten west of the Willamette Meridian and north of the north boundary line of Grays Harbor county, shall be protected and preserved from the fire hazard to which they

are or may be exposed by reason of the unusual quantity of fallen timber upon such lands. It shall therefore be unlawful for any person, firm, company or corporation, their officers, agents or employees, to do or commit any act which shall expose any of the forests or timber upon such lands to the hazard of fire.'' (L. '21, p. 202, § 1.)